

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSE RUBIO-DELGADO,

Plaintiff,

v.

AEROTEK, INC.,

Defendant.

) Case No. 13-cv-03105-SC
)
) ORDER REQUESTING SUPPLEMENTAL
) BRIEFING RE: PROPOSED
) SETTLEMENT
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I. INTRODUCTION

This case involves alleged violations of the Fair Credit Reporting Act ("FCRA"). See 15 U.S.C. § 1681, et seq. Plaintiff Jose Rubio-Delgado purports to represent a class of persons aggrieved by Defendant Aerotek, Inc. ("Aerotek"). Aerotek is a recruiting and staffing agency, and Mr. Rubio-Delgado alleges that Aerotek obtained information about its employees and prospective employees without proper notice and authorization. ECF No. 1 ("Compl.") ¶¶ 2, 5-10. The parties have reached a settlement agreement and now seek the Court's preliminary approval. See ECF

1 No. 52 ("Mot."). Plaintiffs have moved for preliminary approval of
2 the settlement agreement, and the motion is unopposed.

3
4 **II. LEGAL STANDARD**

5 Federal Rule of Civil Procedure 23(e) requires judicial
6 approval of any settlement by a certified class and demands that
7 the settlement be "fair, reasonable, and adequate." When
8 evaluating a settlement agreement that applies to a class, courts
9 may consider some or all of the following factors:

10 [1] the strength of plaintiffs' case; [2] the risk,
11 expense, complexity, and likely duration of further
12 litigation; [3] the risk of maintaining class action
13 status throughout the trial; [4] the amount offered in
14 settlement; [5] the extent of discovery completed, and
the stage of the proceedings; [6] the experience and
views of counsel; [7] the presence of a governmental
participant; and [8] the reaction of the class members to
the proposed settlement.

15 Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 963 (9th Cir. 2009).

16 At the preliminary approval stage, however, the Court need not
17 make a final determination as to the fairness, reasonableness, and
18 adequacy of the settlement. Instead, the Court may grant
19 preliminary approval of a settlement if the settlement agreement

20 (1) appears to be the product of serious, informed, non-
21 collusive negotiations; (2) has no obvious deficiencies;
22 (3) does not improperly grant preferential treatment to
class representatives or segments of the class; and (4)
falls within the range of possible approval.

23 Harris v. Vector Mktg. Corp., No. C-08-5198 EMC, 2011 WL 1627973,
24 at *7 (N.D. Cal. Apr. 29, 2011).

25
26 **III. DISCUSSION**

27 The settlement agreement in this case calls for Aerotek to pay
28 \$5,000,000. ECF No. 50-2 ("Settlement Agreement") ¶ 27. If enough

1 class members submit claims, however, the agreement requires
2 Aerotek to make an additional contribution to the settlement fund,
3 enough to ensure that each class member receives \$42.32, up to a
4 maximum of \$262,500. The agreement provides for Mr. Rubio-
5 Delgado's lawyers to recover up to 25% of the settlement --
6 \$1,250,000, assuming Aerotek is not required to make any additional
7 contribution -- as attorney's fees. Id. ¶ 33. Additionally, the
8 Settlement Agreement indicates that the parties have agreed to pay
9 a total of \$5,000 from the settlement fund to the three named
10 plaintiffs. Id. ¶ 34.

11 The Court has serious concerns about the fairness and adequacy
12 of the settlement. The settlement class includes "[all
13 individuals on whom Aerotek or its agents procured consumer reports
14 for employment purposes in the period beginning two years prior to
15 the filing of the Complaint and continuing through the date the
16 Class list is prepared." Id. ¶ 2. Aerotek's records indicate that
17 the number of class members is about 588,000. Id. The Settlement
18 Agreement provides for the settlement fund to be distributed pro
19 rata (after the deduction of attorney's fees, litigation expenses,
20 settlement administration costs, and incentive awards) to all class
21 members who properly submit claim forms. Id. ¶ 29. If all 588,000
22 class members were to claim their shares of the settlement, Aerotek
23 would be required to make the maximum possible contribution to the
24 settlement fund, which would contain a total of \$5,262,500. Once
25 the proposed attorney's fees and incentive awards are deducted,
26 \$3,941,875 would remain in the fund. Thus each class member would
27 receive about \$6.70.

28 Plaintiffs' claim for relief seeks \$100 to \$1,000 for each

1 violation of FCRA. See ECF No. 1 ("Compl.") ¶ 60. Those amounts
 2 are based on the statutory damages provided for by FCRA. See 15
 3 U.S.C. § 1681n(a)(1)(A). Plaintiffs also sought punitive damages,
 4 costs, and attorney's fees. Compl. ¶¶ 61-62. Therefore, even
 5 assuming the Court were to deny Plaintiffs' punitive damages claim
 6 in its entirety and refuse to award attorneys' fees and costs, the
 7 proposed settlement offers each class member 6.7% of the minimum
 8 amount recoverable were plaintiffs to prevail at trial, and 0.67%
 9 of the maximum recovery.¹ That is plainly inadequate. See, e.g.,
 10 Trombley v. Nat'l City Bank, 759 F. Supp. 2d 20, 25-26 (D.D.C.
 11 2011) (settlement in the range of 17%-24% of potential recovery at

12
 13 ¹ Plaintiffs acknowledge that "Defendant's violation is not the
 14 sort of violation which includes aggravating factors likely to
 15 justify an award over the minimum amount of \$100." Mot. at 21.
 16 That is somewhat puzzling given the allegations in the complaint
 17 that "Aerotek has willfully and systematically violated [FCRA]" and
 18 "consistently undermined Congress's carefully struck balance,
 19 unlawfully placing its business interests above the rights of
 20 consumers." Compl. ¶¶ 7, 15. Additionally, Plaintiffs allege that
 21 "Aerotek's practices violate a fundamental protection afforded to
 22 employees under the FCRA, are contrary to the unambiguous language
 23 of the statutes, and are counter to longstanding judicial and
 24 regulatory guidance." Compl. ¶ 47. Finally, Plaintiffs sought
 25 punitive damages, which may only be awarded where violation of FCRA
 26 is willful. See Guimond v. Trans Union Credit Info. Co., 45 F.3d
 27 1329, 1332 (9th Cir. 1995). Rule 11 of the Federal Rules of Civil
 28 Procedure provides that Plaintiffs' attorney's signature on the
 complaint constitutes a representation that the complaint's legal
 contentions are "warranted by existing law or by a nonfrivolous
 argument for extending, modifying, or reversing existing
 law" Fed. R. Civ. P. 11(b)(2). That Rule additionally
 requires that factual contentions have evidentiary support. Fed.
 R. Civ. P. 11(b)(3). Thus Plaintiffs must have had some basis for
 believing their allegations against Aerotek and that those
 allegations supported an award of punitive damages. Thus it seems
 that Plaintiffs may either have been disingenuous in authoring
 their complaint or are being disingenuous now in abandoning their
 argument about the reprehensibility of Aerotek's behavior. Either
 way, the contrast of the language of the complaint with the
 language in Plaintiffs' motion for preliminary approval creates an
 additional concern that the Settlement Agreement was the product of
 collusive negotiations.

1 trial was within the range of possible approval).

2 However, the parties anticipate that each class member's share
3 of the settlement fund will be about \$40. See Mot. at 20;
4 Settlement Agreement Ex. C at 4. That helps to ameliorate the
5 Court's concern about the adequacy of each class member's share,
6 but it raises a new issue: for each class member to receive \$40,
7 only 98,546 class members -- about 17% -- could submit claims.
8 That only such a small portion of the class would receive any
9 compensation at all is equally concerning to the Court.

10 The fact that the parties apparently expect such a small
11 number of class members to submit claims prompts an important
12 question: why can't the Settlement Agreement simply provide for
13 Aerotek to mail a check to each class member, without requiring
14 class members to submit claim forms? To be sure, courts have
15 approved settlements requiring class members to submit claim forms
16 where class members were difficult to identify, or where
17 calculating each class member's share of the settlement required
18 information the parties did not have. See, e.g., Trombley, 759 F.
19 Supp. 2d at 27 (granting preliminary approval to proposed
20 settlement in part because requirement that class members submit
21 claim forms was not unduly burdensome in light of parties' argument
22 that shares of damages could not be calculated without additional
23 information from class members). Here, neither concern is at
24 issue. Class members are readily identifiable from Aerotek's
25 records, and each class member's share is simply a pro rata portion
26 of the settlement fund (after costs, fees, etc. are deducted). It
27 would be very easy to envision a settlement agreement providing for
28 Aerotek to mail each class member a check for his share of the

1 settlement fund. Remaining money left over from checks not cashed
2 within a certain amount time could simply be redistributed to class
3 members who did cash their checks, along the lines of the process
4 already outlined in the Settlement Agreement. See Settlement
5 Agreement ¶¶ 36-39.

6
7 **IV. CONCLUSION**

8 For the reasons described above, the Court is concerned that
9 the proposed Settlement Agreement may be obviously deficient, fail
10 to fall within the range of possible approval, or be the result of
11 collusive negotiations. At the same time, the Court is cognizant
12 of the well-established policy concerns in favor of settlement.
13 The Court finds that additional briefing may resolve these concerns
14 and permit preliminary approval of the Settlement Agreement.
15 Accordingly, Plaintiffs shall file a supplemental brief of no more
16 than fifteen (15) pages within twenty-one (21) days of the
17 signature date of this Order. That brief should address the
18 Court's concerns with the fairness and adequacy of the Settlement
19 Agreement. Aerotek may file a supplemental brief as well, of no
20 more than fifteen (15) pages, within fourteen (14) days of the
21 deadline for Plaintiffs' submission.

22
23 IT IS SO ORDERED.

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25 Dated: April 1, 2015

26 
UNITED STATES DISTRICT JUDGE